In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-755

PETER CARVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he should have been permitted to withdraw his guilty plea after imposition of sentence on the grounds that he was inadequately represented by counsel and he was incompetent both at the time of the offense and of his plea.

Petitioner was indicted by a grand jury in the United States District Court for the Eastern District of Virginia on seven counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of fraud by wire, in violation of 18 U.S.C. 1343. Petitioner pleaded guilty to one count of mail fraud (count 3 of the indictment) and was sentenced to a term of four years' imprisonment. Represented by new counsel, petitioner then filed a motion for resentencing or reduction of sentence, which was denied after a hearing.

A third counsel subsequently entered his appearance for petitioner and filed a motion under Rule 32(d) of the Federal Rules of Criminal Procedure[1] to set aside judgment of conviction and permit petitioner to withdraw his guilty plea on grounds of manifest injustice, alleging that at the time of his plea petitioner was inadequately represented, and was mentally incompetent both at that time and at the time of the offense. The motion was denied after a hearing. The court of appeals affirmed (Pet. App. C).

Petitioner contends that the judgment of conviction should be set aside to permit him to withdraw his guilty plea due to the "manifest injustice" of trying him with inadequate representation and at a time when he was incompetent to make a voluntary plea. The record of the proceedings in connection with petitioner's plea, the motion for resentencing and the motion to withdraw his guilty plea, however, fail to substantiate petitioner's claims of inadequate representation or mental incompetence.

1. At the proceeding in which he pleaded guilty, petitioner was represented by Albert Grenadier, an attorney with 23 years' experience in criminal and civil litigation.[2] The prosecution first announced the plea bar-

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[1]Rule 32(d) provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct *manifest injustice* the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea. [Emphasis added.]

[2]Petitioner's present counsel later conceded that Mr. Grenadier "has handled many, many criminal cases and is well reputed in this area" (M. Tr. 82). ("M. Tr." refers to the hearing on the motion to withdraw the plea, while "Tr." refers to the plea acceptance proceeding.)

gain whereby petitioner would plead guilty to one count of mail fraud in return for dismissal of the remaining counts of the indictment. It then set forth the factual basis of the guilty plea, which involved a scheme by petitioner, an engineering consultant specializing in the design and construction of ice skating rinks, to defraud Eileen Weisegier by means of false representations that he had obtained a metal "Butler" building in which to house a skating rink he was to build for her (Tr. 2-3). In reply to questions by the court, petitioner stated that he had examined the indictment with his counsel, understood the charge in Count 3, and knew that in order to convict him the prosecution "would have to prove that [he] intended to defraud, and prove that by proof beyond a reasonable doubt" (Tr. 5). He had related to his counsel all the facts of the case, and his counsel in turn had discussed with him "the nature of the charge and any possible defenses * * * " (*ibid.*). Petitioner admitted that the factual basis of the plea as set forth by the prosecution was correct (Tr. 7).

The district judge confirmed petitioner's understanding of the maximum sentence he could receive and of his rights to a jury trial and to remain silent and confront witnesses.[3] He then questioned petitioner's counsel as follows (Tr. 8-9):

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[3]Petitioner does not challenge the court's compliance with Rule 11 of the Federal Rules of Criminal Procedure. One purpose of the Rule is to forestall claims such as that raised by petitioner here:

> * * * [T]he Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas. [*McCarthy* v. *United States*, 394 U.S. 459, 465.]

THE COURT: Mr. Grenadier, have you gone over the plea of guilty with the Defendant?

MR. GRENADIER: I have gone over the plea of guilty with him, your Honor, and I would say that the United States Attorney's Office has furnished me with all of their exhibits.

I have had an opportunity to discuss the case very fully with the Agents involved.

I have disclosed what I have determined to Mr. Carver. We have had extensive discussions as to which of the counts in the indictment we felt were defensible and which were not defensible, and I think that as far as I could go, as far as Mr. Carver and I could go together, we have explored every conceivable avenue in this case, and we feel that what the Government is now proposing is fair, and there is no doubt but that he is guilty of Count III, and he had indicated to me in our discussions that he would plead guilty to that count.

THE COURT: All right. In your opinion, then, is the plea voluntarily and understandingly made?

MR. GRENADIER: I believe it is, your Honor.

THE COURT: Does it accord with your understanding of the facts and circumstances in the case?

MR. GRENADIER: It does, sir.

Petitioner's motion for resentencing, filed by his second counsel, John J. Dwyer, raised no issue regarding his guilt or the validity of his plea but questioned only

the validity of certain prior convictions cited in the presentence report (Tr. 24, *et seq.*).[4]

At the hearing on petitioner's motion to withdraw the guilty plea, his first counsel, Mr. Grenadier, detailed his efforts in petitioner's behalf[5] and explained how petitioner had arrived at the decision to plead guilty. He had advised petitioner that the prosecution would have to prove that petitioner made false representations willfully, or, "in layman's terms, that he did it deliberately" (M. Tr. 97-98). Petitioner had admitted his guilt to him as to count 3 (M. Tr. 86).[6] At the same time, petitioner had insisted that he could not take the stand because he would expose himself to cross-examination concerning his prior convictions, although counsel advised him that "without his testimony, it would be virtually impossible

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[4]In rebuttal, the government introduced certified copies of six prior felony convictions of petitioner involving grand and petty larceny, forgery, fraud by wire and false pretenses (Tr. 30). In each case petitioner had pleaded guilty and received a suspended sentence conditioned upon his making restitution (M. Tr. 74). As we note below, petitioner had never raised an insanity defense prior to the present case (M. Tr. 16).

[5]Besides going over the indictment with petitioner, Grenadier stated that he had secured copies of all documents in the case, examined everything in the government's investigative file including the statements of all witnesses, researched the elements the government would have to prove, and discussed with petitioner the expected testimony of the witnesses and "the extent to which the government had gone to * * * bring people in who could verify the statements" in the investigative file (M. Tr. 84-86).

[6]Mr. Grenadier stated (M. Tr. 92):

> Of all the counts, [count 3] was the one I thought was strongest, and Mr. Carver confirmed that belief. As a matter of fact, he said to me as far as the Butler building was concerned he said, I don't know what I could do with that [count].

to defend" against the charge in count 3 (M. Tr. 85-86). In sum, as Mr. Grenadier testified (M. Tr. 88):

> It was my best judgment after going through your file and discussing the matter with him, I think in very great detail, that the government could definitely make the charge if he did not testify with respect to the Butler building, could probably make some of the other counts stick, also, and my best judgment was that on three counts he probably would have no defense.[7]

As thus outlined, Mr. Grenadier's assistance was, we submit, diligent and fully in accord with professional standards. Petitioner contends, however, that Grenadier's failure to have him examined by a psychiatrist, pursuant to 18 U.S.C. 4244, when "he knew or strongly suspected that [petitioner] was mentally incompetent deprived petitioner of * * * the effective assistance of counsel" (Pet. 20-21). Petitioner, however, overstates Grenadier's appraisal of his mental condition. Grenadier did not suspect

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[7]Petitioner having agreed to a guilty plea, counsel then persuaded the government to drop seven felony counts against him in return for his plea on one count, thus limiting petitioner's exposure to punishment to a maximum sentence of five years' imprisonment notwithstanding petitioner's prior convictions.

The fact that counsel did not interview any of the government's witnesses (Pet. 21) is without significance in view of petitioner's admission of guilt as to count 3. Moreover, the expected testimony of the witnesses was set out in the government's investigative file, which Grenadier carefully examined and discussed with petitioner (M. Tr. 86). Petitioner's additional claim that counsel should have made him "produce and organize his business records which would have shown that the 'victim' was not defrauded" but received more "from the petitioner than she gave to him" (Pet. 21) is also without substance; petitioner admitted to Grenadier prior to his guilty plea that he owed Mrs. Weisegier an estimated $150,000 (Tr. 18).

that he was mentally incompetent. Rather, as he testified (M. Tr. 91):

> * * * [A] man who is capable of earning the kind of money that Mr. Carver is capable of earning, being honest, I couldn't figure out why he would do all of these other things and I suggested that he consult a psychiatrist or whether he ever considered consulting a psychiatrist, and he said at one point he thought maybe he would but he never quite got around to it.[8]

Grenadier's belief that petitioner's "chaotic" business affairs and resort to fraudulent schemes must have reflected "some psychiatric problem" was not a sufficient basis to require that he force petitioner to be examined against his will.[9]

2. Petitioner contends that he was in fact incompetent at the time of the offense and of his guilty plea. He bases this contention on the testimony of his psychiatric witness, Dr. Hamman. The weight to be given Dr. Hamman's testimony, however, was for the hearing judge to determine. Dr. Hamman diagnosed petitioner as an "ob-

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[8]Earlier, Grenadier testified (M. Tr. 88):

> * * * [O]ne of the first things I think I discussed with him was whether or not he had considered psychiatric help because it appeared to me in discussing it with him that his business was very chaotic, and it seemed to me what was happening in his business was that he was falling behind in some areas and getting new jobs and using some of the funds from one job to fund another job, and I got the impression that as long as he stayed in the consulting area for a fee, he had no problems, but as soon as he would get into construction for somebody the same pattern would occur.

[9]Petitioner's psychiatric witness, Dr. Hamman, testified that Grenadier had advised petitioner to see a psychiatrist, "but he wouldn't do it" (M. Tr. 31).

sessive, impulsive personality with manic traits" and classified his behavior as a mental illness (M. Tr. 8-9). On cross-examination, however, Dr. Hamman conceded that he had examined petitioner subsequent to his conviction and sentencing, had spent only two hours with him, and had not "[gone] into a great deal of detail" (M. Tr. 16). Moreover, he conceded that at the time of petitioner's plea petitioner "had some understanding of what he was doing," but that "he was in a hurry to get back to work and he seemed to have in his mind if he did this then he would get an opportunity to make restitution and [eventually] everything will get straightened out" (M. Tr. 14).

Petitioner denied that he was or ever had been insane (M. Tr. 63, 73) but insisted that he had been "used" by his two previous counsel, "led down the path to plead guilty" (M. Tr. 63, 75). He had not intended to defraud Mrs. Weisegier but "was playing for time" in misrepresenting the existence of the "Butler" building until he could pay her back (M. Tr. 69-70).

The evidence, far from showing manifest injustice in the court's acceptance of petitioner's guilty plea, fully supported its conclusion that petitioner's representation was adequate, and petitioner was competent at the time he pleaded guilty.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.